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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **(OAKLAND DIVISION)**

13 Fletcher Carson)	Case No. 113766 LB
)	
14 Plaintiff,)	REPLY IN SUPPORT OF 12(B)6
)	MOTION TO DISMISS
15 vs.)	
)	HEARING DATE: February 16, 2012
16 Versimart Software, Inc.)	HEARING TIME: 11:00 AM
17 Phillip Thoren;)	COURTROOM: 4
18 James Garvey;)	Judge: Hon. Laurel Beeler
19 Carl Raff;)	
Joe Dawson; and)	
Andy Thoren)	
20 Defendants)	
)	

I. INTRODUCTION

This memorandum replies to the opposition of Plaintiff. It adds new argument from the brief of co Defendant Raff, Docket Number 45 in this action and incorporates that brief by reference.

II. WHAT IS NOT HAPPENING

It is meaningful to note that as near as the Defendants can tell, this appears to be nothing less than a vendetta against them with no other purpose. In particular, look at what the Plaintiff *fails* to allege:

- He fails to allege that he is being denied access to the software;
- He fails to allege that he is attempting to use the software to build a commercial entity;
- He fails to allege that any Defendants pose a competitive threat as a result of this conduct;
- He makes only generic allegations about “offering the products for sale” because he cannot make any specific allegations regarding attempted sales.

III. SUMMARY OF OPPOSITION BRIEF

Generally speaking, the opposition brief constitutes mostly a rant about the Defendants, their alleged wronging of the Plaintiff, and their audacity in defending themselves. For example, Plaintiff asserts that “the evidence is so overwhelming, that the judgment might be seen as a foregone conclusion.” Opposition to Defendant Motion to Dismiss (“Opposition”) P1L27. Defendants, by exercising their rights, make a “mockery” of the justice system. Opposition. P2L2-3. That said, Moving Defendants focus on the minimal areas in the Opposition relevant to this motion.

1 **A. ISSUES COMMON TO COGNITIVELOGIC, vCONTENT AND vSIM**

2 The following discussion addresses issues common to all three claims.

3
4 **1. FAILURE TO ALLEGE INFRINGING ACTIVITY.**

5 Plaintiff's response to the argument that the complaint fails to allege infringing activity is
6 simply "courts have held that these activities clearly require copying." Plaintiff bears the burden
7 of pleading the elements of the infringement. Plaintiff bears the burden of identifying which
8 courts have held these activities to be infringing with citations to case law so, among other
9 things, Defendants can have a chance to review and contest the holdings of those cases as
10 applied to this case, locate opposing authority and so the Court has sufficient basis for its ruling.

11 The allegations pose many hurdles for Plaintiff even at this early stage. Plaintiff will need to
12 plead adequate facts to show that simple use of the code by accessing it constitutes copying.
13 Moreover, the Plaintiff will need to adequately plead how the code itself is transmitted over the
14 internet or some details about the transmission, such as which Defendant engaged in the
15 transmission, when such transmission took place, to whom, etc.

16 Defendants notes in his claims that the code generates code. The generated code would not
17 be part of the copyright but would be uncopyrighted output. This would be similar to the fact
18 that, for example, an auto manufacturing company bringing action against another auto
19 manufacturing company for violating its intellectual property rights in robotic technology used in
20 its plant, would have no viable claim that the autos produced were part of that technology
21 violation.

22 The allegations of the activities of what Defendants "must" do are conclusory, are not plead,
23 and are unsubstantiated by case law.

1 Further, the allegations of use are generic and nothing to which any individual Defendant can
2 respond. However, even if true, they amount to nothing more than use of the code (voluntarily
3 placed on VSI servers), not copying the code, as Defendant suggests.

4 If cases are brought to the attention of the Court or the Defendants after the filing of this
5 reply brief, Defendants request leave to review such cases and present discussion or opposing
6 authority.

7 **2. NO ALLEGATIONS AGAINST INDIVIDUAL DEFENDANTS**

8 Plaintiff makes no specific allegations against the individual Defendants in their individual
9 capacities to which they can respond. To the contrary, Plaintiff pleads that the individual
10 Defendants were acting in their agency capacities such that they would not be personally liable.
11 See for example First Amended Complaint ¶4 ¶¶g “Defendant Versimart Software, Inc. . . . is
12 using the other Defendants (James Garvey, Carl Raff, Joe Dawson, and Andy Thoren) in either
13 employee or contractor relationships to circumvent demand to terminate usage. Moreover, with
14 regard to Defendant Thoren, the sole allegation is alter ego, with no fact of any kind plead to
15 establish this claim. And, of course, this does not make him directly liable for infringement.

16 **3. INSUFFICIENT IDENTIFICATION OF COPYRIGHTS.**

17 Plaintiff only describes the alleged copyrighted material by a name and a generic expression
18 of its function. However, if actually copyrighted, the copyright only protects the specific
19 expression of the idea, not the idea itself. Because Plaintiff identifies the code by generic name
20 rather than provide a copyright number, or attach a certificate of copyright, or attach the specific
21 code involved as an exhibit and because copyright law does not bar Defendants from using other
22 code with the same functionality, it does not sufficiently allege which copyrights, if any, have
23 been infringed. See *Universal Surface Technology, Inc. v. Sae-A Trading America Corp* 2011
24 WL 281020, *6 (C.D. Cal January 26, 2011).

B. COGNITIVELOGIC ISSUES

1. PLAINTIFF OFFERS NO RESPONSE TO HIS OWN ADMISSION THAT HE POSSESSES ALL COPIES OF THE COGNITIVELOGIC CODE.

Plaintiff pleads that he took full possession of all CognitiveLogic Code when he left the VSI. He now admits that his own pleading contradicts critical allegations necessary to prove his case. *Now he calls his own pleading "absurd."* No matter what he pleads after that, he can never overcome his own pleading. Defendants cannot infringe on something which *Plaintiff pleads* they do not possess. End of Copyright infringement claim regarding CognitiveLogic.

2. THE APPENDIX IS HELPFUL TO THE COURT AND THE PLAINTIFF: IT CONFIRMS THE SOFTWARE IS NOT COPYRIGHTED.

The Exhibit attached by the Plaintiff is indeed very helpful to this Court, the Superior Court and the Defendants. It constitutes an admission by the Plaintiff that the CognitiveLogic software is not copyrighted.

3. THE ALLEGATIONS ARE TOO VAGUE, AS, AMONG OTHER THINGS, THEY DO NOT CONFIRM THE COPYRIGHTED MATERIAL.

C. VCONTENT ALLEGATIONS

Preliminary note. It looks like the outlining was not complete in the Points and Authorities. At P5L17, there should have been a Section D, which should have read vContent. The action Section D should have been Section E.

1. ARGUMENTS OF PLAINTIFF DIFFER FROM THE PLEADINGS, MAKING THEM INCAPABLE OF BEING UNDERSTOOD.

Plaintiff now seems to argue something different than appears from his pleadings. He seems to be taking the position that the contract at issue was related to *source* code not presumably

1 object code which Pitt installed on the servers *without condition*. At this juncture, he seems to be
2 arguing that Defendants are infringing on a copyright regarding software which was never
3 delivered. See Opposition P14L20 “Defendants have bypassed the need for contract law
4 because Software has not been delivered.” Defendants need to have a clearer understanding
5 through pleadings of just what the Plaintiff claims. The snippet of the skype conversation shows
6 agreement to *something*.

7 **2. PLAINTIFF ADMITS PITT BREACHED FIDUCIARY DUTIES**

8
9 Plaintiff states “Pitt acted correctly in not holding VSI to ransom and totally disrupting the
10 business of VSI by withdrawing his software from use pending negotiation and execution of the
11 agreements.” Opposition P14L15 et seq. By extension then, Plaintiff argues that to do so would
12 be wrong, or rather, in legal terms, a breach of his fiduciary duties as an officer of VSI. But this
13 is *exactly* what Pitt did. He purportedly transferred the rights to the software to someone he
14 *knew would sue the company and hold it for ransom*. He had many other less damaging options,
15 if he felt the rest of management incompetent, including, but not limited to:

- 16 (a) if he felt he had the right, negotiating a license for other than options.
17 (b) negotiating a non exclusive license;
18 (c) licensing the software to third parties, including plaintiff.

19 What Pitt did was transfer all of the rights to the software
20

21 **3. PLAINTIFF FAILS TO ARGUE AGAINST APPLICATION OF CLEAN HANDS**

22 The argument of Plaintiff to the application of the Clean Hands doctrine seems to be only
23 that the Defendants lack clean hands. This misapplies the doctrine. It is the plaintiff who must
24 come to court with clean hands which he does not.
25

1 **D. vSIM ALLEGATIONS**

2 **1. AMPLE ALTERNATIVE CONSIDERATION**

3 Plaintiff claims that he owned 100% of VSI at the time of entering into the SLA.
 4 Accordingly, his ownership interest in the entity to which the software was being transferred and
 5 ability to increase the value of his 100% ownership in that entity would be ample consideration
 6 for the transfer, thus providing a satisfactory explanation for the royalty free nature of the
 7 license.
 8

9 **2. THE SLA PERMITS USE OF vSIM, EVEN AFTER BREACH.**

10 The SLA permits use of vSim even after breach. In relevant part, Section 7.4, Effect of
 11 Termination, provides as follows:

12 In the event of termination by the Company, pursuant to Section 7.3, the Company shall have
 13 the right, but not the obligation, to immediately recover from Licensee an amount equal to
 14 the Transfer Fee (b) plus any late fees; (c) less the aggregate License Fees received by the
 15 Company during the Term . . . In addition as a remedy for exclusivity provided to the
 16 Licensee by the Company and lost opportunity related thereto, Company shall have a
 17 worldwide, royalty free, assignable, perpetual, and irrevocable right and license to use,
 18 execute, reproduce, display, perform, sublicense, distribute, and modify an Licensee
 19 derivative works . . .
 20

21 Against this plain English, the reply of the Plaintiff is “it does not.” He offers no alternative
 22 interpretation, cites no conflicting provisions of the contract and no case law authority.

23 **3. THE ASSIGNMENT CLAUSE RESTRICTS ASSIGNMENT**

24 Because the assignment clause restricts assignment to only one condition, it should be
 25

1 interpreted to bar assignments on any other condition. To hold otherwise makes the restriction
2 meaningless. Plaintiff offers a specious interpretation of a clause which he drafted while
3 controlling both parties. The only reason to put that clause in was to restrict the ability of OLLC
4 to assign its rights pursuant to the express provisions of the clause.

5
6 **V. CONCLUSION**

7 For the foregoing reasons and reasons stated in the original points and authorities, the motion
8 should be granted.

9 Respectfully submitted,

10 Dated: January 23, 2012

MY GENERAL COUNSEL GROUP

11
12
13 /s/ Michael Prozan

14 Michael W. Prozan

15 Attorney for Defendants
16 VERISMART SOFTWARE, INC., PHILLIP
17 THOREN, JAMES GARVEY, ANDY
18 THOREN, and JOE DAWSON,
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